

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
Plaintiff,

NO. CR. 97-0040 WBS

v.

ORDER RE: MOTION TO DISMISS

LEONEL RIVERA,  
Defendant.

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Defendant Leonel Rivera filed a pro se motion for modification of imposition of fine pursuant to 18 U.S.C. § 3572. The United States now moves to dismiss defendant's motion for lack of jurisdiction.

On September 3, 1999, defendant was convicted of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a) and 18 U.S.C. §2 and conspiracy to do the same in violation of 21 U.S.C. § 846. Defendant was sentenced to a term of 360 months and fine of \$20,000, plus a \$200 special penalty assessment, on April 26, 2000. After the Ninth Circuit affirmed his conviction on appeal, this court

1 denied defendant's initial 28 U.S.C. § 2255 habeas petition on  
2 June 24, 2005. On June 7, 2007, defendant filed a motion for  
3 reconsideration of reduction of sentence under 18 U.S.C. §  
4 3582(c)(2), which was recategorized as a successive § 2255 motion  
5 and subsequently denied on June 19, 2007.

6 In his present motion pursuant to 18 U.S.C. § 3572,  
7 defendant petitions the court to vacate or decrease or his  
8 \$20,000 fine upon the ground that he is currently "with no means  
9 of ever being able to satisfy his obligation." Under § 3572,  
10 however, the court may only "adjust the payment schedule, or  
11 require immediate payment in full."<sup>1</sup> 18 U.S.C. § 3572(d)(3).  
12 Therefore, even if defendant's purported predicament evinced a  
13 "material change in the defendant's economic circumstances that  
14 might affect the defendant's ability to pay the fine," as  
15 defendant alleges, the court cannot vacate or decrease the amount  
16 of his fine.

17 Defendant suggests in his moving papers that he "was  
18 represented by ineffective legal counsel who failed to make any  
19 attempt or put forth any effort to oppose such imposition of a  
20 fine . . . ." Insofar as defendant's instant request relies on  
21 this "ineffective assistance of counsel" contention, the court  
22 would have to recategorize it as a successive 28 U.S.C. § 2255  
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24 <sup>1</sup> The court previously denied defendant's request to  
25 adjust the payment schedule in its Order of April 13, 2005, in  
26 which it found that any alternative schedule of installment  
27 payments could hinder the Bureau of Prisons from collecting on  
28 the fine while defendant is in prison. (Apr. 13, 2005 Order  
1:17-19.) That motion was denied without prejudice, and the  
court suggested that defendant could later request the probation  
officer to set up a payment schedule after defendant is released  
from prison. (Id. at 1:20-22.)

1 motion. Massaro v. United States, 538 U.S. 500, 504 (2003); see  
2 also Castro v. United States, 540 U.S. 375, 381 (2003) (allowing  
3 federal courts to "ignore the legal label that a pro se litigant  
4 attaches to a motion and recharacterize the motion in order to  
5 place it within a different legal category"). Because defendant  
6 has already filed two § 2255 motions, this court lacks  
7 jurisdiction to hear a third § 2255 motion without certification  
8 from the Ninth Circuit Court of Appeals. See Gonzalez v. Crosby,  
9 545 U.S. 524, 530 (2005) (holding that before a district court  
10 can accept a successive habeas petition, "the court of appeals  
11 must determine that it presents a claim not previously raised  
12 that is sufficient to meet § 2244(b)(2)'s new-rule or  
13 actual-innocence provisions").

14 IT IS THEREFORE ORDERED that the United States' motion  
15 to dismiss defendant's request for modification of imposition of  
16 fine be, and the same hereby is, GRANTED.

17 DATED: June 12, 2008

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20 WILLIAM B. SHUBB  
21 UNITED STATES DISTRICT JUDGE  
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